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Report : Claim of J. English

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IN THE SENATE OF THE UNITED STATES.

FEBRUARY 25, 1887.—Ordered to be printed.

Mr. SPOONER, from the Committee on Claims, submitted the following

REPORT:

[To accompany bill S. 502.]

The Committee on Claims, to whom was referred the bill (H. R. 2244) for the relief of J. M. English, administrator of the estate of Richard Fitzpatrick, deceased, have had the same under consideration, and respectfully report:

Col. Richard Fitzpatrick, a citizen of Florida, owned, at the breaking out of the Seminole war in that State, a large plantation at the mouth of the Miami River. The plantation was under a considerable degree of cultivation, and well supplied with buildings. The Indians, on or about the 6th day of January, 1836, attacked the plantation and compelled the overseer in charge, with the negroes, to abandon it. They left a large quantity of personal property, which, together with the buildings, was destroyed by the Indians. Some time in the year 1836 the plantation was occupied by part of the naval forces of the United States, under the command of Lieutenant Powell, who built block-houses, pickets, &c., thereon, of timber taken from the Fitzpatrick plantation, and established there a military post called Fort Dallas. The block-houses and other structures thus constructed were subsequently destroyed by the Indians. Precisely how long the plantation was occupied at this time by troops does not appear.

Afterwards, in February or March, 1838, by the order of the Quartermaster-General of the United States, Fort Lauderdale, on New River, and Fort Dallas, on the Miami River, were established on the same plantation, and they, together with the entire plantation, were occupied by the troops of the United States from that time to the year 1842. Whilst the plantation was thus occupied, timber for building and wood for fuel for the use of the troops and of steamboats in the service of the United States were taken therefrom. The quantity of timber and wood thus taken cannot well be accurately ascertained, but it seems that the quantity was considerable.

Fitzpatrick made a claim for damages caused by the Indians, and for the occupation of the plantation by the United States forces, and for wood cut on the land to the 1st day of April, 1840, his claim amounting altogether to \$60,320, the greater part of it being for losses through Indian depredations, evidently upon the assumption that it was the duty of the United States Government to protect its citizens from depredation by the Indians, and that the failure to do so involved a liability upon the part of the Government to make good to Fitzpatrick his losses through Indian depredations. The claim, so far as it was based upon the losses occasioned by the Indians, never found any favor with

Congress. The claim was first presented to Congress by bill in the Senate at the first session of the Thirty-second Congress.

The Committee on Claims reported a bill for his relief (S. 431, Report 234, first session Thirty-second Congress), which passed the Senate, but failed of action in the House. A bill for his relief was introduced in the Senate during the Thirty-third Congress, reported favorably by the Senate Committee on Claims, and again passed the Senate. This Senate bill, together with all the papers in the case, was referred, by resolution of the House of Representatives, on the 3d day of March, 1855, to the Court of Claims for adjudication under the then existing law. The Court of Claims, Judge Scarburgh delivering the opinion, reported to Congress in 1858 an opinion upon the case, and a bill in favor of Fitzpatrick for the sum of \$12,000, "in full for the use and occupation of the plantation as a military post of the United States between the years 1836 and 1842, as also for the damage done to said plantation in the cutting of wood and lumber during such occupation." The judgment of the court was unanimous. (Volume 3, Court of Claims Reports to Congress, first session Thirty-fifth Congress, Report No. 175, May 8, 1858.)

The bill thus recommended by the Court of Claims was reported to the House of Representatives by the Committee on Claims at the first session of the Thirty-sixth Congress, House Report No. 86, but no action was taken by the House on said bill. The bill thus recommended by the court was passed by the Senate during the first session of the Thirty-fifth Congress, but was not reached in the House. The Senate Committee on Claims again reported a bill to pay the amount found by the Court of Claims, during the first session of the Thirty-sixth Congress. The bill passed the Senate April 6, 1860, and was reported back without amendment, and a recommendation for its passage, by the Committee on Claims of the House April 20, 1860, but was not acted upon by the House.

Three adverse reports have been made upon the claim. One, a House report, was made before the reference to the Court of Claims, and was based mainly upon the exorbitant amount claimed, another by the Committee on Claims of the Senate, March 19, 1884 (through Mr. Cameron), and the other by this committee April 14, 1886, Senate Report No. 539. The bill was recommitted to the committee on the 18th day of May, 1886, and has been reconsidered by the committee upon the original and additional testimony.

The claim was lawfully referred, under existing law, in 1858, to a tribunal established by Congress for the purpose, which, having jurisdiction of the parties, proceeded to ascertain the facts, and to make its report. It is true that the evidence given upon the trial as to the amount of timber and lumber cut upon the plantation is not altogether definite. It is, however, found by the court that timber was taken for the construction of the block houses, and for other Army uses, at Fort Dallas and at Fort Lauderdale, and that quantities of wood were taken for the use of the Army and of steamboats in the Government service. It is not disputed, either, that for several years the plantation was occupied by the forces of the United States. The rental value was of course a matter of opinion, and in their estimates the witnesses differed, one witness estimating it at \$6,000 a year.

General Jesup, in his report to the Secretary of War, dated January 13, 1841, says:

As the petitioner could make no use of the land himself, and as the fuel was cut and hauled by the troops, from \$2,000 to \$3,000 a year would, I should think, be ample compensation for both,

Mr. Mallory, then a Senator from Florida, estimated the fair rental value, including the wood, at \$3,000 per annum, and this estimate, supported by the other evidence, the court adopted, as Mr. Mallory was familiar with the plantation, and was frequently there while it was occupied by Fitzpatrick, and also by the troops as a military post.

The place seems to have been taken for use, in a measure, permanent, and the committee is quite unable to discover any good reason why just compensation should not be made for its use.

Quartermaster-General Jesup reported to the Secretary of War (Mr. Poinsett), in January, 1841, as follows :

Timber for building and for fuel for the use of the troops and for steamboats in the public service has been cut at both posts. Colonel Fitzpatrick is justly entitled to a reasonable rent for his land and compensation for the timber cut for the use of the public, but it would be difficult, without a careful examination of the premises, to determine what would be a fair compensation.

It seems to have been the practice of the Government to pay rental for property taken and occupied under the circumstances attendant upon this case.

General Harney, who was in command for a time at the plantation, in an affidavit made the 19th day of July, 1886, states—

That he fully concurs in everything that Senator S. R. Mallory stated in his testimony, as reported by Judge Scarburgh in the opinion delivered by the Court of Claims, reported May 14, 1858. He further states that the plantation of Richard Fitzpatrick was occupied by United States troops as a military post from 1836 to some time in 1842, during which time large quantities of wood and other property were taken therefrom and used by Government troops for Government purposes, and that by reason of this occupation said Fitzpatrick was excluded from the use of his property during the period aforesaid, and that a rental of \$3,000 per annum is a moderate and reasonable compensation for the use of said property, and that the judgment for \$12,000 rendered by the Court of Claims is a moderate and reasonable compensation for the use of said fields, pastures, and other property by United States troops during their occupation.

In a letter, under date August 11, 1886, referring to the use of the word "excluded" in his affidavit, he says that he meant that while the troops were occupying the plantation Fitzpatrick could not cultivate it, or "to put it in another way, the plantation of cleared lands was in use by the troops for Army purposes, such as barracks, forts, pickets, stockades, and pasturage for horses and cattle, and the timber was used for Army wants, and Colonel Fitzpatrick was deprived by the Army of its use." He adds:

The plantation was a valuable one, and it was not to be supposed that Colonel Fitzpatrick, who had spent so much in stocking it and who owned his hands, would not have worked it if the United States troops had not wanted it for military purposes.

* * * * *

The Government saved a good deal of money by occupying Colonel Fitzpatrick's plantation. It was the best location for a depot anywhere around; and I repeat, that in my opinion the judgment of the Court of Claims ought to be paid. It is just, it is reasonable, and if the Government wants to do justice to its citizens it ought to pay interest on the amount found due by its own court.

Mr. Moreno, formerly United States marshal of Florida, makes affidavit July 17, 1886, in which he states that he knew the plantation to be a valuable one, and that from his knowledge of the value of plantations at the time he thinks Senator Mallory's estimate of its value and rental was correct.

Thus there can be no dispute that the Government justly owed Fitzpatrick for the use and occupation of the plantation, including the timber and the wood cut and used for Government purposes (unless the

circumstances were such as to preclude liability, a question which will be noticed briefly hereafter), the only element of doubt being as to the amount. The committee is disposed to think that it is, under all the circumstances of the case, no more than fair to adopt the amount found by the Court of Claims to be due, especially as that is supported by the affidavit recently made by General Harney.

It was said by Mr. Cameron in his adverse report, by way of criticism upon the finding of the Court of Claims, that it was based somewhat upon the testimony of Senator Mallory, which was not under oath. The committee think that this objection is not well founded, and that the United States ought not to assert it. The record shows that the United States was represented in the cause by a solicitor, and that there was an agreement between the Government counsel and the counsel of claimant, under which the interrogatories to the Hon. S. R. Mallory and the answers thereto were admitted as evidence in the cause. That agreement ought to be held binding upon the United States. The report of Mr. Cameron also states, as against the force of the findings of the Court of Claims, that "the evidence given was all upon the part of the claimant; no evidence was submitted upon the part of the United States." Certainly this fact ought not to operate to the prejudice of the claimant. It was not his business to hunt up and offer evidence on behalf of the United States.

The Government, as before stated, was represented by counsel, and if it was not efficiently represented that is hardly a fault imputable to the claimant. While it may be true that Colonel Fitzpatrick ought to have been required to make more definite proof as to the quantity of timber taken and wood cut, and the market value thereof, and as to the rental value of the plantation, in order to establish with accuracy his claim against the Government, it seems to your committee to be equally true that the Government officers were somewhat in fault in respect of this matter also. The posts were established by authority of the Quartermaster-General. The property, in the absence of the owner, Colonel Fitzpatrick, was being constantly used for the benefit of the Government. It is not unjust to the Government to say that some duty of keeping account of the quantity of private property taken, and thus used for the public benefit, devolved also upon the officers of the Government who took it.

Altogether the committee feel, as something was evidently due, that after so great lapse of time the finding of the Court of Claims should furnish the foundation for a legislative settlement of the claim.

It has been suggested in one or two adverse reports that there is no evidence that Colonel Fitzpatrick could or would have occupied the place if the military post had not been established there. That seems to the committee to be entirely inconclusive of his right to recover against the Government for its use and occupation; and, moreover, it is quite clearly shown by Quartermaster-General Jesup's statement, and by the letter of General Harney, and it would seem to need no proof, that while the plantation was being occupied, as it was, for a military post, it could not well be used by the owner for purposes of tillage.

It was also said in the report of Mr. Cameron that the plantation was situated in a *hostile* country, where *flagrant wars* existed between the United States and the Seminole Indians; that the property was taken possession of, occupied and used under the *war power* of the Government as a military necessity, and that the taking possession of and occupying the property was a lawful act of war, and must be presumed

to have been proper and necessary, as the officer in command so determined, and that the case falls within the rule of "the Grey Jacket" (5th Wallace, 342), "that for property within an enemy's country taken or destroyed in time of war, as a military necessity, the owner, whether an enemy or a friend, is not entitled to compensation."

The committee is not prepared to say that the contest of the Government with a little band of Seminole Indians during those years made that region an "enemy's country," or made applicable to the case the principle declared in "the Grey Jacket". Florida was a part of the United States, the laws of the United States were in force there, the courts of the United States were open there, the Indians never acquired it by conquest or otherwise.

Mr. English, the administrator, excuses apparent laches in prosecuting the claim by an affidavit presented to the committee, and which, upon that subject, is satisfactory to the committee.

It is not improper to remark, while not bearing upon the merits of the claim, perhaps, that Colonel Fitzpatrick was a generous and patriotic citizen, whose public service, cheerfully and freely rendered, entitle him to consideration at the hands of the Government. In January, 1855, a report was made by the Committee on Military Affairs of the House of Representatives, in which it is stated that he was appointed an aid-de-camp by General Clinch in the Seminole campaign and served in that capacity from the fall of 1835 to the month of May or June following; that he was better acquainted with the country than any man in the Army, was bold and intelligent, and always ready and forward to render any useful service. Captain Thurston, formerly of the Third Artillery, said:

No one in General Clinch's wing of the Army rendered more active and real service than he did.

General Scott says that he personally saw much of Colonel Fitzpatrick in the march from Fort Drane to Tampa Bay and back to the north of Florida, in the campaign, and that he can testify to his zeal and the great value of his services in that march. He served as an aid on the staff of General Call from the 20th of September to the 7th of December, 1836. General Call stated:

Colonel Fitzpatrick was a valuable and efficient member of his staff, performing, as necessity required, the duties of aid-de-camp and quartermaster during the campaign against the Seminole Indians.

He volunteered also at Camargo in 1846 for the term of the Mexican war, and served as a private in Captain McCullough's company, and was honorably discharged after the taking of Monterey, serving for a time on the staff of General Worth, serving, as appears from the papers, without compensation.

The committee report the bill back with the recommendation that the same do pass.

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